FILED
MAR 30 1992

No. 91-1305

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

CARMEN GUEVARA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In our petition, we argued that the Fourth Circuit's decision is clearly wrong and warrants review by this Court, for several reasons. *First*, it is inconsistent with this Court's ruling in *United States* v. *Benchimol*, 471 U.S. 453 (1985), that the federal courts cannot imply into plea agreements terms to which the parties did not agree. *Second*, the Fourth Circuit's analysis is inconsistent with that of the First Circuit in *United States* v. *Anderson*, 921 F.2d 335 (1990), which ruled that the government's failure to insert into a plea agreement a clause expressly preserving the government's right to appeal the sentence did not constitute a waiver of that right. *Third*, neither Fed. R. Crim. P. 11 nor the Due Process Clause prohibits

a defendant from entering into a plea agreement waiving the right to appeal her sentence, even when the government retains its appeal right.[1] For those reasons, we urged this Court to grant review and summarily reverse the judgment below.

Respondent has not answered our arguments. She does not cite, much less distinguish, *Benchimol* or *Anderson*, and she does not claim that either Rule 11 or the Due Process Clause bars plea agreements like the one here, or requires the government to waive its right to appeal if a defendant waives her own. Instead, she argues that the plea agreement was ambiguous as to whether the government waived its appeal rights, and that this ambiguity must be resolved against the government, because the government drafted the agreement. Br. in Opp. 3-6. That argument lacks merit.

The terms of the plea agreement are clear on their face. Respondent agreed to plead guilty to one count of conspiring to violate federal law, to pay a special assessment, to forfeit property, to cooperate with the government's investigation, and, "in exchange for the concessions made by the government in this agreement," Pet. App. 14a, to waive her right to appeal a sentence within the statutory maximum, *id.* at 13a-15a. In return, the government agreed not to prosecute respondent or her mother for other violations of

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[1] In our petition, we pointed out that the Fourth and Ninth Circuits had upheld plea agreements requiring a defendant to waive his right to challenge his sentence on appeal against the claim that such waivers are invalid. *United States* v. *Wiggins*, 905 F.2d 51 (4th Cir. 1990); *United States* v. *Navarro-Botello*, 912 F.2d 318 (9th Cir. 1990), cert. denied, No. 91-6833 (Mar. 23, 1992). Since we filed the petition, the Eighth Circuit has also held that such waivers are valid. *United States* v. *Rutan*, No. 91-1154 (Feb. 12, 1992).

federal law arising out of this investigation. *Id.* at 16a-17a. Nothing in the plea agreement conditions respondent's obligations or the waiver of her appeal right on the government's waiver of its own right to appeal. The only provision of the plea agreement involving a waiver of the right to appeal is Paragraph 3, and it provides that only respondent waives the right to appeal the sentence. The agreement also contains an integration clause, stating that the written agreement forms the entire bargain between the parties absent a written supplementation or modification (of which there was none), and that "[n]o promises or representations have been made by the United States except as set forth herein." *Id.* at 17a. Thus, in this case as in *Anderson*, there is "an utter absence of any language conditioning defendant's plea on the government's waiver of appellate rights." 921 F.2d at 338.

Respondent observes that in Paragraph 4 of the plea agreement the government explicitly preserved its right to bring an accurate version of the facts to the district court's attention. She claims that the government thereby impliedly waived its right to challenge on appeal whatever sentence the district court thereafter imposed. At the least, respondent argues, the government's express retention of these rights in Paragraph 4 renders ambiguous the government's failure expressly to preserve its own right to appeal in Paragraph 3. Br. in Opp. 4-5. In other words, respondent relies on silence in the plea agreement as affirmative proof that the government waived its appeal right. That argument also lacks merit.

It was unnecessary for the government in the plea agreement expressly to preserve its right to appeal the sentence. Congress expressly authorized such

appeals, see 18 U.S.C. 3742(b), and the government need not include in a plea agreement the rights that it enjoys by statute. In addition, as the First Circuit explained in *Anderson*, respondent makes "a bootstrap argument," 921 F.2d at 338: the government's silence cannot be treated as a waiver of its right to appeal. "To read the Agreement, *ex silentio*, to include a waiver by the government of its right of appeal would give defendant more than is reasonably due. * * * While the government must be held to the promises it made [in a plea agreement], it will not be bound to those it did not make." *Ibid.* (quoting *United States* v. *Fentress*, 792 F.2d 461, 464 (4th Cir. 1986); bracketed material in *Anderson*).[2]

In any event, the court of appeals did not purport to rely on any ambiguity in the plea agreement. Instead, the court held, as a matter of law, that the government would be deemed to have waived its appeal right because respondent had waived hers. Pet. App. 3a ("such a provision against appeals must also be enforced against the government, which must be held to have implicitly cast its lot with the district court, as the defendant explicitly did"). The Fourth Circuit dismissed the government's appeal because it believed that allowing the government to appeal when the defendant could not was a "too one-sided" approach to

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[2] In our petition, we argued that respondent could not have been misled into believing that the government had waived its right to appeal her sentence. As proof, we noted that respondent did not ask the Fourth Circuit to dismiss our appeal on the ground that we had waived our appeal right. Pet. 13. Respondent claims that even if her *lawyer* did not believe that the government waived its appeal right, *she* certainly did. Br. in Opp. 6. The failure to raise any such claim earlier, however, justifies skepticism as to its truth. See *Taylor* v. *Illinois*, 484 U.S. 400, 414 (1988).

plea bargaining. *Ibid.* As we explained in our petition, this Court rejected that proposition in *Benchimol*, and it should do so here as well.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted and the judgment below should be summarily reversed.

Respectfully submitted.

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MARCH 1992